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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re
16 COMMUNITY BANCORP,
17 Debtor.

18 YVETTE WEINSTEIN, CHAPTER 7
19 TRUSTEE OF COMMUNITY
BANCORP,

20 Plaintiff,

21 v.

22 PROGRESSIVE CASUALTY
23 INSURANCE COMPANY, ET AL.,
24 Defendants.

Case No. BK-S-10-20038-LED

Chapter 7

Adversary Proceeding No. 13-01168-led

DEFENDANT PROGRESSIVE
CASUALTY INSURANCE
COMPANY'S MOTION TO DISMISS
OR STAY ADVERSARY
PROCEEDING AND MEMORANDUM
IN SUPPORT

Date: December 16, 2013
Time: 1:30 p.m.

NOW COMES Defendant, Progressive Casualty Insurance Company (“Progressive”), by and through its undersigned counsel, and respectfully requests that this Court enter an order dismissing without prejudice this Adversary Proceeding filed by Yvette Weinstein, Chapter 7 Trustee of Community Bancorp (“Trustee”), or, in the alternative, staying the Adversary Proceeding until such time as Progressive’s appeal of the Court’s September 6, 2013 order in the *In re Community Bancorp* bankruptcy proceeding (the “Bankruptcy Proceeding”) [DE 398] has been resolved.

INTRODUCTION

Progressive brings this motion in the interest of judicial economy. The issue whether the D&O liability insurance policy Progressive issued to Community Bank of Arizona (“CBOA” or the “Bank”) provides coverage for a claim by the FDIC as receiver of the Bank against the Bank’s former directors and officers (the “Ds & Os”) is now the subject of two pending actions. The first is the declaratory judgment action Progressive filed in the U.S. District Court for the District of Arizona in February. The second is this Adversary Proceeding the Trustee filed some seven months later. While it is clear that this issue will be adjudicated, it remains to be resolved whether that adjudication will take place in the Arizona District Court or this Court.

In its September 6, 2013 order in the Bankruptcy Proceeding, this Court held that Progressive’s declaratory judgment action constituted a “technical violation” of the automatic bankruptcy stay. That issue presently is before the Bankruptcy Appellate Panel for the Ninth Circuit (“BAP”) pursuant to Progressive’s appeal of the Court’s September 6 order. The Arizona District Court has stayed the declaratory judgment action pending resolution of Progressive’s appeal.

In order to avoid irreparable harm to the defendants and for the sake of efficiency and judicial economy Progressive respectfully submits that this Court should do the same with

1 respect to this Adversary Proceeding. Absent such relief, there is a very real possibility that
 2 the parties, and the Court, will be subject to significant and unnecessary burden and expense
 3 in addressing issues in this matter that may ultimately be resolved in the Arizona District
 4 Court.

5 **BACKGROUND**

6 On or about July 13, 2012, the Federal Deposit Insurance Corporation, as Receiver of
 7 Community Bank of Arizona (“FDIC-R”), filed a lawsuit (the “FDIC-R Action”) against the
 8 former directors and officers of CBOA who are named as defendants in this Adversary
 9 Proceeding. The FDIC-R Action is pending in the United States District Court for the
 10 District of Arizona and is captioned *FDIC-R v. Jamison, et al.*, No. 2:12-cv-01508. On
 11 February 4, 2013, Progressive filed an action, also in the United States District Court for the
 12 District of Arizona, seeking a declaratory judgment that Directors & Officers / Company
 13 Liability Insurance Policy for Financial Institutions No. 4548839-08 that it issued to, *inter*
 14 *alia*, CBOA (the “Progressive Policy” or the “Policy”) does not provide coverage for the
 15 FDIC-R Action.¹

16 **I. The Trustee’s Motion to Determine Violation of the Automatic Stay**

17 Shortly after Progressive filed the CBOA DJ Action, counsel for the Trustee
 18 contacted counsel for Progressive and questioned whether it violated the automatic
 19 bankruptcy stay.² In response to this inquiry, Progressive’s counsel directed the Trustee’s
 20 counsel to the Ninth Circuit’s decision in *In re Pintlar Corp.*, 124 F.3d 1310 (1997), and
 21

22 ¹ Progressive’s declaratory judgment action is captioned *Progressive Casualty Insurance*
 23 *Company v. Federal Deposit Insurance Corporation, as Receiver of Community Bank of*
 24 *Arizona, et al.*, No. 2:12-cv-00232-HRH (D. Ariz.) (the “CBOA DJ Action”).

25 ² (Bankruptcy Proceeding, DE 382, Declaration of Matthew J. Dendinger in Support of
 26 Opposition of Progressive Casualty Insurance Company to Motion to Determine Violation of
 27 the Automatic Stay (“Dendinger Dec.”), ¶ 8; Ex. D).

1 noted that it directly addressed this issue.³ *Pintlar* held that a declaratory judgment action
 2 such as the CBOA DJ Action does not come within the scope of the Bankruptcy Code's stay
 3 provision. Notwithstanding an invitation by Progressive's counsel to contact him if she had
 4 any further questions, neither he nor Progressive heard anything further from the Trustee's
 5 counsel. Some four months later, with no further communication to Progressive or its
 6 counsel in advance, the Trustee filed a motion in the Bankruptcy Proceeding on July 12,
 7 2013 asserting that, contrary to *Pintlar*, this action does violate the automatic stay. On
 8 August 27, 2013, the Bankruptcy Court held a hearing during which it announced its decision
 9 concerning the Trustee's motion. The Court's September 6, 2013 order holding that the
 10 CBOA DJ Action constitutes a "technical violation" of the automatic stay followed.

11 On September 20, 2013, Progressive filed a Notice of Appeal of the Court's
 12 September 6 order. Pursuant to the Briefing Order issued by the BAP, Progressive's opening
 13 brief and appendix are due by November 12, 2013, the Trustee's response brief and appendix
 14 are due within 21 days after service of Progressive's opening brief, and Progressive's reply
 15 brief is due within 14 days after service of the Trustee's response. Under this schedule,
 16 briefing on Progressive's appeal should be concluded by no later than December 23, 2013.
 17 The Briefing Order further provides that "[t]he parties generally should expect that oral
 18 argument will occur shortly after briefing is completed" and that "the BAP seeks to set
 19 argument as soon as practical after briefing is completed." The first dates subsequent to
 20 December 23, 2013 on which the BAP is hearing oral arguments are January 22, 23 and 24,
 21 2014.

22 **II. The CBOA DJ Action**

23 After the Trustee filed her Motion to Determine Violation of the Automatic Stay, the
 24 court in the CBOA DJ Action entered an order on July 29, 2013 that the CBOA DJ Action

25 ³ (*Id.*).

1 would be stayed pending the outcome of the Trustee's motion.⁴ On September 13, 2013,
 2 after the Court entered its order on the Trustee's motion, the court in the CBOA DJ Action
 3 entered an order to show cause "why some or all parties in this declaratory judgment action
 4 should not be dismissed without prejudice."⁵ Progressive responded to that order on
 5 September 27, 2013,⁶ and the court entered a further order on October 2, 2013.⁷ In
 6 consideration of Progressive's response, the court *did not* dismiss the CBOA DJ Action but,
 7 rather, expressed its view that the action "should be stayed pending the ruling of the [BAP]."⁸
 8 Thereafter, on October 15, 2013, the court entered an order staying the CBOA DJ Action
 9 pending resolution of Progressive's appeal by the BAP.⁹ If Progressive prevails in its appeal,
 10 the CBOA DJ Action will proceed. In that instance, Progressive would seek to have the
 11 Adversary Proceeding dismissed, if it has not already been.

12 **ARGUMENT**

13 It is clear that the question of whether the Progressive Policy provides coverage for
 14 the FDIC-R's claims against the former CBOA Ds & Os ultimately will be adjudicated. Still
 15 unsettled, though, is whether that question will be adjudicated in this Court in the recently-
 16 filed Adversary Proceeding or by the District Court in Arizona in the CBOA DJ Action
 17 Progressive filed nearly a year ago.¹⁰

18 ⁴ (CBOA DJ Action, DE 52).

19 ⁵ (*Id.*, DE 54).

20 ⁶ (*Id.*, DE 55).

21 ⁷ (*Id.*, DE 56).

22 ⁸ (*Id.*).

23 ⁹ (*Id.*, DE 57).

24 ¹⁰ Progressive believes Arizona is the proper forum for this dispute. All but one of the Ds &
 25 Os reside in Arizona. The FDIC receivership is of a bank that was located in Arizona, and
 the FDIC-R's underlying action against the Ds & Os is pending in the U.S. District Court in
 Arizona. The only connection to Nevada is the happenstance that CBOA's bank holding
 company at the time it failed, Community Bancorp, was headquartered there.

1 Progressive has filed the necessary appeal to obtain further review of the issue
 2 whether the stay applies to the CBOA DJ Action in the first instance and, by extension,
 3 whether the coverage issues are properly addressed in this Court or in the Arizona District
 4 Court. If the Court's order ultimately is affirmed, absent relief from the stay (discussed
 5 below), the CBOA DJ Action likely will not proceed, and the issue of coverage may be
 6 resolved in the context of the Adversary Proceeding. However, if the Court's order is
 7 reversed, as Progressive respectfully believes it should be, the CBOA DJ Action will
 8 proceed, and the issue of coverage will be resolved there. By granting the instant motion for
 9 dismissal or a stay of the Adversary Proceeding until the path forward is clear, the Court can
 10 avoid the possibility that it and the parties will spend significant time and resources litigating
 11 issues in this Court that ultimately may be resolved in the Arizona District Court.

12 Alternatively, this Court could enter an order in the Bankruptcy Proceeding granting
 13 relief from the automatic stay, to the extent it applies, to allow the CBOA DJ Action to
 14 proceed. Progressive intends to file a motion seeking such relief shortly.¹¹ If granted by the
 15 Court, such relief may obviate the need for Progressive to continue pursuing its appeal of the
 16 Court's September 6 order.¹²

17 Courts have recognized that a stay of proceedings is in the interests of judicial
 18 economy when a pending appeal could materially affect whether or how they will proceed.
 19 For example, in *New Cingular Servs. v. Burkart*, No. 2:07-cv-02451-MCE, 2008 U.S. Dist.
 20 LEXIS 58563 (E.D. Cal. Aug. 1, 2008), a creditor in a bankruptcy adversary proceeding
 21 initiated by the trustee filed a motion to compel arbitration. *Id.* at *3. The bankruptcy court
 22 denied the motion, and the creditor appealed to the district court. *Id.* at *4–5. The creditor
 23

24 ¹¹ The Trustee has declined to agree to this relief.

25 ¹² It remains Progressive's position that, pursuant to the Ninth Circuit's decision in *Pintlar*,
 the automatic stay is inapplicable to the CBOA DJ Action.

1 also filed a motion in the bankruptcy court asking that the adversary proceeding be stayed
2 pending resolution of its appeal. *Id.* at *4. The bankruptcy court denied that motion, and the
3 district court reversed. *Id.* at *2, 4.

4 After first setting forth the “[f]actors a court must consider when determining whether
5 to issue a stay pending appeal,” the district court concluded that those factors weighed in
6 favor of granting the requested stay. *Id.* at *5–17. The factors set forth by the court were
7 ““(1) whether the stay applicant has made a strong showing that he is likely to succeed on the
8 merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether
9 issuance of the stay will substantially injure the other parties interested in the proceeding; and
10 (4) where the public interest lies.”” *Id.* at *5 (quoting *Hilton v. Braunkill*, 481 U.S. 770, 776
11 (1987)). The court went on to state that “[e]ssentially, the party seeking the stay must
12 demonstrate that the injury it would sustain if the stay did not issue outweighs the harm the
13 stay would cause the party opposing the stay” and that “[w]here the moving party has
14 established irreparable harm to the movant, absence of harm to the opposing party, and lack
15 of injury to the public interest, the ‘likelihood of success’ requirement is relaxed somewhat.”
16 *Id.* (citations omitted).

17 As is the case here, the court in *New Cingular* determined that the creditor “would
18 suffer ‘substantial harm’ through potentially unnecessary litigation in the adversary
19 proceeding if this Court reverses the bankruptcy court’s decision to deny [the creditor’s]
20 Motion to Compel Arbitration.” *Id.* at *8. Absent a dismissal or stay of the Adversary
21 Proceeding pending Progressive’s appeal of the Court’s September 6 order, Progressive and
22 the other defendants in this action could suffer “substantial harm” through potentially
23 unnecessary litigation in this Adversary Proceeding if the BAP reverses the Court’s
24 September 6 order and the CBOA DJ Action proceeds. As noted above, the individual D&O
25

1 defendants in this proceeding agree that it should be dismissed or stayed pending resolution
2 of Progressive's appeal.

3 With respect to the merit of Progressive's appeal, Progressive believes there is a high
4 likelihood that its appeal will be successful. Progressive believes the Court erred in declining
5 to follow prior Ninth Circuit precedent set forth in *In re Pintlar Corp.*, 124 F.3d 1310 (1997),
6 and in adopting the Trustee's attempts to distinguish *Pintlar* based on immaterial factual
7 differences between *Pintlar* and this matter. Finally, as the court held in *New Cingular*,
8 “[g]ranting the Motion to Stay Pending Appeal is in the public interest” because “[s]taying a
9 potentially unnecessary adversary action in a bankruptcy court conserves judicial resources.”
10 2008 U.S. Dist. LEXIS 58563, at * 16; *see also, e.g.*, *Bank of America, N.A. v. Landis*, No.
11 2:11-cv-1338-RCJ-PAL, 2011 WL 5117909, at *2 (D. Nev. Oct. 27, 2011) (granting motion
12 to stay pending appeal); *Abudiab v. City & County of San Francisco*, No. C 09-01778 JSW,
13 2012 U.S. Dist. LEXIS 47962, at *1–2 (N.D. Cal. Apr. 4, 2012) (staying proceeding pending
14 resolution of interlocutory appeal “in the interests of judicial economy”); *Bristow v.*
15 *Lycoming Engines*, No. CIV. S-06-1947 LKK/GGH, 2008 U.S. Dist. LEXIS 50416, at *8
16 (staying proceeding pending appeal of order decertifying class); *Balvage v. Ryderwood*
17 *Improvement & Serv. Ass'n, Inc.*, No. C09-5409BHS, 2010 U.S. Dist. LEXIS 98776, at *2, 6
18 (W.D. Wash. Sept. 1, 2010) (staying action pending discretionary, interlocutory appeal);
19 *Stadler v. McCulloch*, 882 F. Supp. 1524, 1527–28 (E.D. Pa. 1995) (noting that in
20 considering a motion to stay, “[c]ourts must consider the time and effort of counsel and the
21 litigants with a view toward a policy of avoiding piecemeal litigation” and granting the
22 motion to stay pending appeal (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936))).
23 Progressive respectfully suggests that the Court should follow the reasoning of these cases in
24 this matter and dismiss or stay the Adversary Proceeding pending resolution of Progressive's
25 appeal of the Court's September 6 order.

CONCLUSION

For all the foregoing reasons, Progressive respectfully requests that the Court enter an order dismissing this matter with prejudice or, in the alternative, staying this matter pending final resolution of Progressive’s appeal of the Court’s September 6, 2013 order and for such other and further relief as the Court deems just and proper.

Dated this 7th day of November, 2013.

Respectfully submitted by,

/s/ Brian E. Holthus

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 7, 2013, I electronically filed the foregoing paper with the Clerk of the Court using the Court's CM/ECF system, which will send notification of such filing to all counsel of record, including the appellee.

/s/ Agnes R. Wong